2008

State of Utah v. Heather Richards : Brief of Appellee

Utah Court of Appeals

Case No. 20080855

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Heather Richards,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for possession of a controlled substance with intent to distribute, in the Third District Judicial District Court of Utah, Summit County, the Honorable Bruce C. Lubeck presiding.

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Oral Argument Requested

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STATEMENT OF JURISDICTION

Defendant appeals from a conviction for possession of a controlled substance (marijuana) with intent to distribute. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2008).

STATEMENT OF THE ISSUE

Did Trooper Jensen have reasonable suspicion to briefly extend the traffic stop for a canine sniff where he detected an overwhelming odor of air freshener, observed other odor-masking agents, and saw that defendant—the sole occupant—had two cell phones?

Standard of Review. The appellate court reviews for clear error the factual findings underlying a trial court's decision to grant or deny a motion to suppress. *State v. Krukowski*, 2004 UT 94, ¶ 11, 100 P.3d 1222. The trial court's legal

conclusions are reviewed non-deferentially for correctness, including its application of the legal standard to the facts. *State v. Brake*, 2004 UT 95, ¶ 15, 103 P.3d 699.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. CONST. Amend IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Charge. Defendant was charged with possession of a controlled substance (marijuana) with intent to distribute, a third degree felony, in violation of UTAH CODE ANN. § 58-37-8 (West 2004 & Supp. 2007); improper lane travel, a class C misdemeanor, in violation of UTAH CODE ANN. § 41-6a-710 (West 2004); and following to close, a class C misdemeanor, in violation of UTAH CODE ANN. § 41-6a-711 (West 2004). R1-3.

Motion to suppress denied. Defendant moved to suppress sixty pounds of marijuana found in the trunk of her car on the ground that she was detained without reasonable suspicion. R40-49; *see also* R56-60. An evidentiary hearing was held on 7 April 2008. *See* R55. The trial court denied the motion in a written Memorandum Decision. R67-77 (a copy is attached in addendum A).

Conditional guilty plea. Pursuant to a plea bargain agreement, defendant pled guilty to the felony distribution charge, with the condition that she could challenge the trial court's ruling on appeal, and the other charges were dismissed. *See* R99-106.

Sentence. The trial court imposed the statutory indeterminate term of zero to five years. R122-23. The trial court then stayed imposition of the prison term and placed defendant on probation for thirty-six months. *Id.*

Timely notice of appeal. Defendant filed a timely notice of appeal. R124-25.

STATEMENT OF THE FACTS[1]

Shortly before 10:00 p.m. on 8 November 2007, Trooper Jensen, of the Utah Highway Patrol, was on duty in Summit County and observed a car traveling on I-80 drift over the "fog" line separating the right side of the road from the dirt shoulder. R67-68 (a copy of the trial court's written Memorandum Decision is attached in the addendum). As he watched, the car then drifted into the passing lane to its left and remained one car length behind another car traveling in the left lane. R68. The trooper stopped the car based on these observations. R68; *see also* R55:5.

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[1] The facts are set forth in the light most favorable to the trial court's ruling. *See State v. Tetmyer*, 947 P.2d 1157, 1158 (Utah App. 1997).

Defendant was the driver and sole occupant. R68. In response to the trooper's request, she produced a California driver's license and a registration in the name of another person. *Id.* Trooper Jensen asked where she was going, to which defendant replied she was driving to Minnesota to get her son. *Id.* When the trooper asked why she did not fly to Minnesota, defendant said that her son did not like to fly. *Id.* Seeing a picture of a four- or five-year-old child near the console, and believing from his own experience that young children like to fly, the trooper found defendant's response to be less than credible. *Id.*

While obtaining defendant's documentation, Trooper Jensen noticed in the car a can of ArmorAll and a can of Lysol on the floor, several orange peels strewn on the floor and hanging out of containers, fast food items on the floor, two cell phones, and "a strong, overwhelming odor of air fresheners." *Id.* at 68-69.[2]

Trooper Jensen ran a warrants check but found nothing amiss. R69. A second officer arrived and got out of his car as Trooper Jensen returned defendant's papers and instructed her on proper following distance. *Id.* He then asked if he could ask

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[2] At preliminary hearing, Trooper Jensen clarified that the first thing he smelled "was the oranges, and then it was the air fresheners." R54:27. He also noted that ArmorAll and Lysol have a strong fragrance, *id.* at 25, and that he was trained to look for all of the above items as possible indicators of criminal activity. *Id.* at 9, 18.

her some questions, and defendant said yes. *Id.* He did not tell defendant she was free to leave, and she did not ask. *Id.* Trooper Jensen's car remained parked behind defendant's with his emergency lights activated, and the second trooper was parked behind him. *Id.* Trooper Jensen first asked if defendant had any prescription drugs, weapons, or illegal substances, and defendant responded no. *Id.* He then asked if she had marijuana, methamphetamines, cocaine, heroin, or ecstasy, and defendant again responded no. *Id.* When Trooper Jensen asked if she used any of these substances, defendant said, "no." *Id.* She then refused him permission to search the car, explaining that "he had no reason to search." *Id.* The trooper responded that he would have a drug dog run around the car, noting that a positive indication from the dog would give him probable cause to search the car. *Id.* The second trooper then ran his dog around defendant's car, sniffing and scratching around the rear license plate. R69-70. Trooper Jensen asked defendant to get out of the car, and defendant dropped a "smoking pipe" in the process. *Id.* The troopers then opened the trunk and found approximately sixty pounds of marijuana. *Id.*

Fourteen minutes passed from the beginning of the stop until the dog indicated on defendant's trunk. R70. Less than five minutes passed from when

Trooper Jensen returned defendant's documents to when the drug dog alerted. R70.[3]

Based on the above facts, the trial court determined that 1) defendant raised no challenge to the initial traffic stop, which was valid; 2) defendant was detained after the conclusion of the traffic stop, when Trooper Jenson returned her documents and continued to speak with her; but that 3) defendant's extended detention was justified by reasonable suspicion that she may be trafficking drugs. *Id.* at 71, 73-75.

In so ruling, the trial court emphasized that Trooper Jensen "observed many indications of odor masking agents," including "an overwhelming odor of air fresheners," "a can of Lysol, a can of ArmorAll," and "orange peels." *Id.* at 74. Additionally, the trial court noted that Trooper Jensen saw two cell phones. *Id.* While these items "by themselves would not amount to any level of reasonable suspicion," the trial court recognized that viewed as a totality, and in light of the trooper's training and experience, the overwhelming odor of air freshener together with observations of other masking agents and two cell phones in defendant's sole

[3] The trial court determined the timing based on the DVD recording of the traffic stop. *See* R68, 70; *see also* Exh. # 1.

possession, gave rise to reasonable suspicion that defendant may be trafficking narcotics. *Id.* at 74; *see also id.* at 75.

Accordingly, this reasonable suspicion justified Trooper Jensen's brief extension of the traffic stop to ask defendant whether she was transporting narcotics:

> Given those objective indications of possible criminal activity often associated with controlled substances, the officer could temporarily detain defendant to quickly dispel or confirm those reasonable suspicions based on those articulated factors.

Id. at 74-75.

Because Trooper Jensen's reasonable suspicion "was not dispelled by the brief conversation" with defendant, the trial court determined that Trooper Jensen continued to act reasonably in asking for consent to search, and when consent was denied, running a drug dog around defendant's car:

> . . . [Trooper Jensen] took the most rational step of asking for consent, to quickly dispel or confirm the suspicion. When that consent was refused, the officer took the next reasonable step designed to quickly, at roadside with a mobile vehicle, dispel or justify and confirm his suspicion. That consisted of having a drug detection dog go around the vehicle quickly.

Id. at 75.

Finally, the canine alert gave rise to probable cause to search defendant's car, and the subsequent discovery of sixty pounds of marijuana in the trunk justified defendant's arrest. *Id.* at 75.

SUMMARY OF THE ARGUMENT

The trial court properly ruled that defendant's further temporary detention following the completion of the traffic stop was justified by reasonable suspicion. Trooper Jensen reasonably suspected defendant was masking the odor of drugs in her car when he detected an overwhelming odor of air fresheners, observed numerous masking agents, including Lysol, ArmorAll, and orange rinds, and also saw two cell phones in defendant's sole possession. The trial court's ruling denying the motion to suppress should therefore be affirmed.

ARGUMENT

TROOPER JENSEN HAD REASONABLE SUSPICION TO BRIEFLY EXTEND THE TRAFFIC STOP FOR A CANINE SNIFF WHERE HE DETECTED AN OVERWHELMING ODOR OF AIR FRESHENER, SAW OTHER ODOR MASKING AGENTS, AND ALSO SAW THAT DEFENDANT, THE SOLE VEHICLE OCCUPANT, HAD TWO CELL PHONES

Defendant claims that the trial court erred in ruling that Trooper Jensen had reasonable suspicion to extend the traffic stop to question her about narcotics and to run a drug-detection dog around her car. Because her further detention was not supported by reasonable suspicion, defendant reasons, the trial court erred in

admitting the subsequently discovered marijuana. Aplt. Br. at 14. Defendant's challenge to the trial court's determination of reasonable suspicion lacks merit and should be rejected.

It is well established that a "detention [incident to a traffic stop] 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" *State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994) (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983), and *Terry v. Ohio*, 391 U.S. 1, 19-20 (1968)); *see also Illinois v. Caballes*, 543 U.S. 405, 407-09 (2005) (holding suspicionless canine sniff during routine traffic stop was reasonable where it did not prolong stop beyond time reasonably required to complete it); *Meuhler v. Mena*, 544 U.S. 93, 100-101 (2005) (applying *Caballes* and holding officers may ask unrelated questions, so long as questions do not prolong detention). Moreover, "[o]nce the purpose of the initial stop is concluded, . . . the person must be allowed to depart," "*unless* an officer has probable cause or reasonable suspicion of a *further illegality*." *State v. Hansen*, 2002 UT 125, ¶ 31, 63 P.3d 650 (emphasis added).

Reasonable suspicion of a further illegality arises when an officer articulates facts supporting "that criminal activity 'may be afoot.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 30); *accord State v. Kohl*, 2000 UT 35, ¶ 11, 999 P.2d 7. "Inarticulate hunches" will not do. *Terry*, 392 U.S. at 22. On the other

hand, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Indeed, an officer is under no obligation to rule out innocent conduct prior to initiating, or as in this case, extending a traffic stop. *See State v. Markland*, 2005 UT 26, ¶ 17, 112 P.3d 507 (citing *Arvizu*, 534 U.S. at 277). "This is because the public interest in investigating criminal activity is sufficiently important to justify the minimal intrusion into personal security that such investigatory detentions entail." *Id.* (citing *Arvizu*, 534 U.S. at 273). Simply put, there need only be articulable facts from which an officer can reasonably infer that criminal activity "may be afoot." *See Terry*, 392 U.S. at 30.

Moreover, when examining an investigatory stop, "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* 21-22 (citations omitted). In assessing reasonable suspicion, "[c]ourts must view the articulable facts in their totality and avoid the temptation to divide the facts and evaluate them in isolation [from each other]." *Markland*, 2005 UT 26, ¶ 11 (case citation and quotation marks omitted). Reasonable suspicion must be evaluated based on the totality of the

circumstances confronting the officer at the time. *See State v. Alverez*, 2006 UT 61, ¶ 14, 147 P.3d 425 (citing *Arvizu*, 534 U.S. at 274). "Courts must . . . 'judge the officer's conduct in light of common sense and ordinary human experience and . . . accord deference to an officer's ability to distinguish between innocent and suspicious actions.'" *Markland*, 2005 UT 26, ¶ 11 (quoting *United States v. Williams*, 271 F.3d 1262, 1268 (10th Cir. 2001)); *accord State v. Warren*, 2003 UT 36, ¶¶ 20-21 (courts should consider an officer's subjective assessment of facts). Finally, in a "swiftly developing situation," such as a traffic stop and investigation, courts "should not indulge in unrealistic second-guessing." *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

Here, Trooper Jensen developed reasonable suspicion of further illegality during the traffic stop: He observed numerous masking agents in the passenger compartment (ArmorAll, Lysol, and orange rinds), two cell phones in defendant's sole possession, and detected an overwhelming odor of air freshener. R67-69, 74. Thus, defendant's "further temporary detention" after the traffic portion of the stop was concluded was justified by reasonable suspicion that she was involved in drug trafficking. *Hansen*, 2002 UT 125, ¶ 31. Far from an inarticulate hunch, Trooper Jensen's brief detention of defendant was based on objective facts that supported a reasonable suspicion that criminal activity "may be afoot." *Terry*, 392 U.S. at 30.

This Court has previously recognized that "the presence of multiple air fresheners [is an] accepted . . . factor that can support, when viewed in conjunction with other facts, the existence of reasonable suspicion of drug use or transportation." *State v. Hechtle*, 2004 UT App 96, ¶ 13, 89 P.3d 185. The Tenth Circuit has also recognized that the smell of air freshener and other strong odors can support "reasonable suspicion on the part of law enforcement officials that the odor is being used to mask the smell of drugs." *State v. Salzano*, 158 F.3d 1107, 1114 (10th Cir. 1998); *see also United States v. West*, 219 F.3d 1171, 1178-79 (10th Cir. 2000) (scent of air freshener); *United States v. Villa-Chaparro*, 115 F.3d 797, 802 (10th Cir. 1997) (strong smell of detergent and observation of detergent crystals); *United States v. Hernandez-Rodriguez*, 57 F.3d 895, 899 (10th Cir. 1995) (strong smell of perfume); *United States v. Ray*, 973 F.2d 840, 842 (10th Cir. 1992) (recognizing orange peels often used to mask odor of marijuana); *United States v. Stone*, 866 F.2d 359, 362 (10th Cir. 1989) (strong smell of patchouli oil); *accord Flood v. State*, 2007 WY 167, ¶ 21, 169 P.3d 538 (strong odor of cologne).

Some courts consider multiple air fresheners sufficient without more to support reasonable suspicion. *See, e.g., United States v. Jeter*, 175 Fed. Appx. 261, 2006 WL 1266523 (10th Cir. 2006) ("presence of numerous air fresheners—in this case at least five—with differing scents, coupled with open rear windows and

additional unopened air fresheners" established reasonable suspicion). But here, in addition to the multiple masking agents (Lysol, ArmorAll, and orange peels) and the overwhelming odor of air fresheners, the officer observed two cell phones. While law-abiding people do carry multiple cell phones, they are common among drug dealers, and so may contribute to reasonable suspicion. *See Jeter*, 175 Fed. Appx. 261, 265 ("presence of multiple cell phones, while possibly innocuous considered in a vacuum, heightened the trooper's suspicion"); *see also United States v. Newland*, 246 Fed.Appx. 180, 189, 2007 WL 1655558 (4th Cir. 2007) (multiple cell phones supported reasonable suspicion driver and sole occupant engaged in drug trafficking). This is because "drug couriers are often given a phone by drug dealers for use to stay in contact throughout the trip." *United States v. Arana-Duarte*, 244 Fed.Appx. 121, 122, 2007 WL 1852139 (9th Cir. 2007) (three cell phones for two vehicle occupants supported reasonable suspicion of drug trafficking). Thus here, the presence of multiple masking agents, overwhelming smell of air fresheners, and an extra cell phone would have warranted a reasonable officer to suspect drug trafficking.

United States v. Farias, 43 F.Supp.2d 1276 (D. Utah 1999), cited by defendant, bears little resemblance to this case. *Farias* involved no overwhelming odor of air fresheners, no observations of multiple masking agents, and no extraneous cell

phones. Rather, the government argued that Farias and his companions' extended detention was justified by the officer's observation of "a road atlas, fast food wrappers, and little luggage in the vehicle," where the occupants claimed to be on a cross-country trip to Iowa from California, and finally, the observation and smell of air fresheners. *Id.* at 1282. The district court rejected the government's argument, ruling that the smell of air freshener was "the strongest support for [the officer's] suspicion of criminal activity," but that the smell of air freshener was "neutralized" in that case because none of the other factors relied upon suggested criminality, and there was "no indication that the air fresheners were masking the odor of drugs." *Id.* at 1283. Here, in contrast, the presence of multiple masking agents, an extra cell phone, and the *overwhelming* smell of air fresheners reasonably suggested defendant was masking the odor of drugs.

Finally, defendant cites examples of Trooper Jensen's testimony at the preliminary and suppression hearings and asserts that the trooper's "subjective belief and impressions at the time of the extension of the stop help to create an appropriate context in which whether reasonable suspicion existed is determined." Aplt. Br. at 11. According to defendant, Trooper Jensen testified that he "was searching for a reason to search the car, implying that he had no reason at that time." Aplt. Br. at 10 (citing R55:25 & "video"). Defendant also claims that the

trooper believed that defendant "was free to leave." *Id.* at 10-11 (citing R54:28 and R55:17). To the extent the record supports defendant's characterization of Trooper Jensen's testimony, his reliance thereon is unavailing.[4]

Trooper Jensen never expressly testified that he did not believe that he had reasonable suspicion to further detain defendant. To the contrary, he testified that he believed he did have reasonable suspicion to briefly extend the traffic stop. *See, e.g.,* R55:18-19. At most, the trooper's testimony supports that he did not believe that he had probable cause to conduct a warrantless automobile search. *See* R55:9-10. Accordingly, as the trial court ruled, the trooper reasonably sought to confirm his suspicion that defendant was trafficking drugs by asking if the vehicle contained drugs and for consent to search—and when consent was refused—running a drug-

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[4] Testimony that Trooper Jensen was allegedly looking for a reason to search does not appear at the record cite provided by defendant. *See* Aplt. Br. at 10 (citing R55/25 (video)). A DVD of the traffic stop was received into evidence at R55:25, but the DVD was not included in the record on appeal. However, at another point in the record, Trooper Jensen did testify that defendant asked him "what [his] reason to search was," and that he told her, "[he] did not have a reason." R55:9; *see also id.* at 10 ("I believe I asked her for a reason, if she had a reason or something like that. I'm asking [defendant] for the reason"). However, this conversation occurred prior to the canine sniff and alert. *Id.*

Additionally, although Trooper Jensen testified that defendant "could have left" once the traffic portion of the stop was concluded, he also clarified that he would not in fact have allowed to her to leave at that time, because he suspected that she may be transporting narcotics. *See* R55:17-19; *see also* R54:28-29.

detection dog around the vehicle. *See* R74-75. The trooper's conduct here would have been unreasonable only if he had conducted a search *before* he had probable cause, or before the drug-detection dog alerted on defendant's trunk. Because the trooper diligently sought to confirm or dispel his reasonable suspicion of "further illegality," or that defendant may be transporting drugs, the "temporary further detention" of defendant for brief questioning and a canine sniff – all of which took less than five minutes – was justified. *Hansen*, 2002 UT 125, ¶ 31; R70, 73-75; *see also Sharpe*, 470 U.S. at 686.

In any event, even assuming the record supported defendant's characterization of the trooper's testimony, the reasonableness of officer conduct is judged against an objective standard. *See Terry*, 392 U.S. at 21-22; *see also Scott v. United States*, 436 U.S. 128, 137 (1978). An "officer's subjective motivation is irrelevant." *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (officer's understanding of legal justification for action irrelevant); *see also State v. Applegate*, 2008 UT 63, ¶ 20, 194 P.3d 925 (recognizing officer's "subjective understanding of the law is irrelevant"). While an officer's subjective interpretation of the facts is "one of several possible aritculable facts a court may consider as part of the totality of the circumstances," *State v. Warren*, 2003 UT 36, ¶ 21, 78 P.3d 590, it is not dispositive. Particularly where, as shown above,

the totality of the circumstances, including the presence of multiple masking agents, an extra cell phone, and overwhelming smell of air fresheners "'would warrant a [person] of reasonable caution in the belief' that the action taken was appropriate." *Warren*, 2003 UT 36, ¶ 14 (quoting *Terry*, 392 U.S. at 21-22).

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted 6 May 2009.

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CERTIFICATE OF SERVICE

I certify that on May 6, 2009, two copies of the foregoing brief were ☑ mailed

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Melissa Teuger

Addendum A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. HEATHER M. RICHARDS, Defendant.	MEMORANDUM DECISION Case No. 071500331 Honorable BRUCE C. LUBECK DATE: May 21, 2008

The above matter came before the court for decision on Defendant's Motion to Suppress.

BACKGROUND

An information was filed on November 15, 2007, charging defendant with possession of a controlled substance, possession of drug paraphernalia and two traffic offenses, improper lane travel and following too close. After being bound over after a preliminary hearing on March 3, 2008, defendant filed a motion to suppress on March 26, 2008. An evidentiary hearing was held April 7, 2008, the court took the matter under advisement and allowed the parties to file further memoranda. Defendant filed a further memorandum May 2, 2008, the State filed its response May 13, 2008. Oral argument was held May 19, 2008. The court took the issues under advisement.

FINDINGS OF FACT

1. Utah Highway Patrol Trooper Jason Jensen (Jensen) was on

duty on November 8, 2007, at about 9:45 p.m. when he observed a vehicle on I-80 traveling eastbound. The vehicle drifted over the "fog" line, or solid line marking the outside of the lane separating the roadway from the dirt shoulder. Then the vehicle drifted into the fast, or left lane, and it was following another vehicle at the distance of one car length in that fast lane. Based on those observations Jensen stopped the vehicle at about mile post 148 and approached the passenger side. The event was captured and is on a DVD which was introduced into evidence and which has been viewed by the court. Ex. 1.

2. Defendant was the driver and sole occupant. Jensen asked for license and registration and defendant produced a California driver license and a registration in the name of another person.

3. Jensen asked where defendant was going and she said to get her son in Minnesota as he did not like to fly after Jensen asked why she was not flying. Jensen saw a photo of a four or five year old child, in the console area of the vehicle, and believed that explanation to be fanciful as it was his belief that any young child would like to fly and he based that on his experience that his own children like to fly.

4. During this interchange of documents and conversation Jensen saw a can of Armor-All on the floor, several orange peels lying about on the floor and partially in and out of containers, a can of Lysol and fast food items on the floor. He also saw two

cell phones and the vehicle had a strong, overwhelming odor of air fresheners.

5. Jensen ran a documents check and the license was valid and there were no warrants for defendant. He returned to defendant and returned her documents to her. He gave her some instructions on not following too closely.

6. Jensen then asked defendant if he could ask some questions and she said yes. Jensen did not tell defendant she was free to leave nor did she ask if she could leave. He was parked behind her and his emergency lights were still engaged. Another officer had arrived and could not be seen on the camera but his voice could be heard and thus the court finds that the second officer was thus out if his vehicle when Jensen returned to defendant's vehicle. That other trooper was parked behind Jensen. Jensen asked defendant if she had any prescription drugs or weapons or illegal substances, then asked if she had marijuana, methamphetamine, cocaine, heroin, or ecstacy and she said no. He asked if she used such substances and she said no. He asked if he could search her vehicle and she said no. He asked why not and she responded that he had no reason to search. Jensen stated he was going to have a dog run around the vehicle and if it indicated that would be probable cause to search the vehicle. He asked her to roll up her window.

7. The other trooper, Cole Douglas (Douglas) who had arrived

at the scene was asked to get his dog out as Jensen's dog was not working well that night. In fact Jensen had his own service animal in his, Jensen's vehicle. Douglas "ran" his drug detection dog around the vehicle defendant was driving. The dog alerted on the trunk area and placed his nose on the rear license plate and scratched at the area.

8. Jensen then went to defendant and defendant, who was on the cell phone at the time telling someone she was being asked to get out of her car, to get out and as she did so she dropped an object onto the ground, and it was a smoking pipe. Jensen asked what that was and defendant said she was trying to hide it.

9. The troopers opened the trunk and found a large amount of marijuana, about 60 pounds. They first searched the interior of the vehicle.

10. The entire event, from the stop to the point the dog "hit" on the rear of the vehicle, took from 2143 hours to 2157 hours, or 14 minutes. From the time Jensen returned the documents to defendant it was 4 minutes until the dog hit on the rear of defendant's vehicle according to the recording of the event. Thus, the claimed illegal detention in this case was the period of 4 minutes plus but under 5 minutes according to the recording.

DISCUSSION and CONCLUSIONS OF LAW

1. Here the stop is not challenged and it was justified based on the driving pattern where defendant crossed over the fog line then followed another vehicle too closely. The actual search is not challenged and the only issue is whether there was sufficient objective suspicion to justify a detention beyond the traffic stop.

2. As is the clear Utah law, as recently reflected in *State v. Baker, 2008 UT App 115,* a seizure occurs if in view of all the circumstances a reasonable person would have believed he was not free to leave. The State bears the burden of proving the reasonableness of the officer's actions during an investigative detention. The officer may detain the driver to conduct a limited investigation of the circumstances that caused the detention. The detention, if it exceeds the reason for the original traffic stop, must be temporary and necessary and must be based on reasonable suspicion the officer can articulate. The court looks to the totality of the circumstances to determine if there is an objective basis for suspecting criminal activity and for a continued detention.

3. Here, obviously, the officer stopped the vehicle for traffic violations and in the legitimate course of that investigation observed facts that, at least to the officer, yielded suspicion sufficient to justify a further detention. Of

course the legal question is not whether this officer believed there was sufficient basis for the detention, but it is an objective question. The traffic issues had been resolved by that time after the officer legitimately obtained her documents, ran checks, and engaged in brief contestation about defendant's destination and travel. That conversation did not delay the already lawful stop. The issue clearly then is whether those observations objectively, as opposed to subjectively, amount to reasonable suspicion to justify the continued detention.

4. Further, as to defendant's concerns about Jensen's "contradictory" statements about whether defendant was or was not free to leave, those feelings and testimony of Jensen, respectfully to Jensen, irrelevant. It is again an objective standard. A person is not detained because the officer believes there is a detention or testifies there is a detention, nor is the person free to leave because the officer believes or testifies she is free to leave. That determination is an objective one for the court.

5. Once Jensen returned the documents to defendant she was either free to leave or detained. The State does not contend this was a consensual encounter and it was not, despite Jensen's possible belief and testimony she may have been free to leave. If a reasonable person would have believed he was not free to leave the person was seized. Here, the court concludes there was a

continued seizure. The officer was talking to defendant, his emergency lights were on in back of defendant's vehicle, there was another officer present, the officer was asking about drugs being in the vehicle, and the court concludes it is a rare person, when an officer is talking through a window to a driver, who would believe they are free to leave. It is true defendant did not ask if she could leave, but all the factors indicate to the court that defendant, as an objectively reasonable person, would not feel free to leave. Jensen did not tell defendant she was free to leave. That is not, of course, required for this to be a consensual encounter, but it remains a factor. In total here there is no indication that a reasonable person would have felt free to leave, and so the court concludes defendant was in fact detained after Jensen returned the documents to her and continued to speak with her.

6. Here, the factors observed by Jensen are frequent and recurring and fairly "standard." Jensen believed the travel plans made little sense because defendant stated her son, approximately age 5, did not like to fly. While that may be unusual, it is not of course by itself unreasonable. The court concludes it is not a legitimate factor that the court considers as it was and is based on Jensen's personal experiences. While it may have been suspicious to Jensen, it is not a factor that adds anything, even in combination, with the other factors.

7. Jensen observed many indications of odor masking agents. Not only was there an overwhelming odor of air fresheners, but a can of Lysol, a can of Armor All, orange peels, and other air fresheners. There were two cell phones. Again, none of those by themselves would amount to any level of reasonable suspicion because many people have an air freshener, for example. Some, but probably few, may have two cell phones. But, based on training and experience, the strong and overwhelming odor, caused by at least 4 different odor-producing agents that were present, could reasonably and objectively be seen as masking agents for the odor of drugs. That, to this court, is an objective set of circumstances that justified the officer in asking questions, that is, further detaining defendant. Given those objective indications of possible criminal activity often associated with controlled substances, the officer could temporarily detain defendant to quickly dispel or confirm those reasonable suspicions based on those articulated factors.

8. The suspicion was not dispelled by the brief conversation, so the officer took the most rational step of asking for consent, to quickly dispel or confirm the suspicion. When that consent was refused, the office took the next reasonable step designed to quickly, at roadside with a mobile vehicle, dispel or justify and confirm his suspicion. That consisted of having a drug detection dog go around the vehicle

quickly.

9. That dog alerted on the vehicle and that gave the officers probable cause to initiate the search of the vehicle and further detain defendant. Of course once the 60 pounds of marijuana was found, there was probable cause to arrest. Again, the actual arrest is not challenged except the basic claim it was the product of an unlawful detention. If the temporary detention was unlawful, there is certainly no attenuation and the arrest would be unlawful.

10. In combination and totality, the "odor" factors amounted to reasonable suspicion to further detain defendant. She was not free to leave but was seized temporarily but that temporary detention was justified by the articulated reasonable suspicion the officer had. Defendant was not detained beyond the traffic stop prior to Jensen's learning all of the above information.

11. Again, there is no challenge to anything but the legality of the detention. The court has found and concludes there was a detention but it was lawful.

The court DENIES the motion to suppress the results of the search.

As noted in court, the matter is set for a status conference June 2, 2008. If the matter is to be set for trial at that time

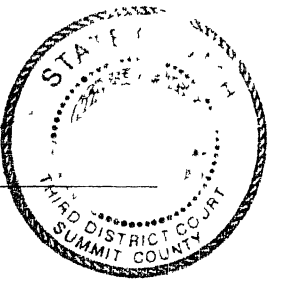
defendant is to be present. If some further negotiations are to be undertaken defendant need not be present until either those negotiations are terminated and the matter is to be set for a change of plea or a trial.

This Ruling and Order is the Order of the court and no other order is required.

DATED this ____ day of_____, 2008.

BY THE COURT:

_____
BRUCE C. LUBECK
DISTRICT COURT JUDGE



Case No: 071500331
Date: May 21, 2008

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 071500331 by the method and on the date specified.

METHOD	NAME
Mail	EDWARD J STONE Attorney DEF 5532 LILLEHAMMER LANE STE 100 PARK CITY, UT 84098
By Hand	STATE OF UTAH

Dated this 21st day of May, 2008.

Deputy Court Clerk

STATE OF UTAH
THIRD DISTRICT COURT
SUMMIT COUNTY

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